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IN THE COURT OF APPEALS OF INDIANA

DAVID I. FRANKLIN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 07A05-0607-PC-405
	)	
STATE OF INDIANA,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE BROWN CIRCUIT COURT
The Honorable Judith A. Stewart, Judge
Cause No. 07C01-0401-FC-33

May 10, 2007

MEMORANDUM DECISION ON REHEARING - NOT FOR PUBLICATION

MAY, Judge

David I. Franklin, *pro se*, petitions for rehearing. Franklin pled guilty to various traffic offenses and received a ten-year sentence. He filed a post-conviction relief ("PCR") petition, arguing his convictions violated the double jeopardy protection afforded him by the Indiana State Constitution. The post-conviction court denied his petition and we affirmed. We held Franklin had waived his right to challenge his convictions on double jeopardy grounds because he pled guilty. We accordingly did not address his double jeopardy claim. *Franklin v. State*, No. 07A05-0607-PC-405 (Ind. Ct. App. January 17, 2007).

We grant Franklin's petition for rehearing but affirm our decision.

DISCUSSION AND DECISION

In August 1998, September 2001, and February 2002, Franklin was convicted of operating a vehicle while intoxicated (OVWI). In March 2002, his driving privileges were suspended for ten years because he was an habitual traffic violator (HTV). In January 2004, Franklin crashed the car he was driving and his six-year-old passenger was seriously injured. At the time of the accident, Franklin's blood alcohol content was 0.26. Franklin was charged with various offenses. He eventually pled guilty to operating a motor vehicle while suspended as a Class D felony,[1] OVWI causing serious bodily injury as a Class C felony,[2]

[1] Ind. Code § 9-30-10-16(a)(1).
[2] Ind. Code § 9-30-5-4(a)(3). Driving while intoxicated is a Class D felony. It is a Class C felony if the defendant has a prior operating while intoxicated conviction within five years.

and being an habitual substance offender (HSO).[3] The predicate offenses for the HSO enhancement were his OVWI convictions in 1998, 2001 and 2002.[4] The trial court sentenced Franklin to an aggregate sentence of ten years, the maximum allowed by the plea agreement. Franklin filed a PCR petition alleging he had been subjected to double jeopardy in violation of the Indiana Constitution. The post-conviction court determined Franklin had waived his right to challenge his conviction on double jeopardy grounds by pleading guilty. On appeal, we agreed Franklin had waived his right and, accordingly, affirmed the post-conviction court without addressing his double jeopardy argument. Notwithstanding Franklin's waiver, we do so now.

Franklin's convictions do not violate the double jeopardy protections found in Article I, Section 14 of the Indiana Constitution.[5] Our Indiana Supreme Court has held:

> [T]wo or more offenses are the "same offense" in violation of Article I, Section 14 of the Indiana Constitution, if, with respect to either the statutory elements of the challenged crimes or the actual evidence used to convict, the essential elements of one challenged offense also establish the essential elements of another challenged offense. Both of these considerations, the statutory elements test and the actual evidence test, are components of the double jeopardy "same offense" analysis under the Indiana Constitution.

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[3] Ind. Code § 35-50-2-10.

[4] At least three substance offense convictions are involved in an habitual substance offender adjudication—two "prior unrelated substance offense convictions" and a third conviction to which the habitual substance offender finding is "attached." *See* Ind. Code § 35-50-2-10(b). In this context, the third, or current, offense is referred to as the "underlying" offense while the prior unrelated substance offense convictions are known as "predicate" or "prior" offenses.

[5] Article I, Section 14 of the Indiana Constitution provides: "No person shall be put in jeopardy twice for the same offense."

Richardson v. State, 717 N.E.2d 32, 49-50 (Ind. 1999). The actual evidence test requires an examination of the "actual evidence presented at trial . . . to determine whether each challenged offense was established by separate and distinct facts." *Id.* at 53. A "defendant must demonstrate a reasonable possibility that the evidentiary facts used by the fact-finder to establish the essential elements of one offense may also have been used to establish the essential elements of a second challenged offense." *Id.*

Franklin argues the predicate offenses for the HSO enhancement are the same offenses that led to the suspension of his license, namely his 1998, 2001, and 2002 OVWI convictions. Therefore, he contends, the actual evidence supporting the HSO enhancement and the driving while suspended conviction is the same. We disagree.

Ind. Code § 9-30-5-4(a)(3) provides: "A person who causes serious bodily injury to another person when operating a motor vehicle . . . while intoxicated . . . commits . . . a Class C felony if the person has a previous conviction of operating while intoxicated within the five (5) years preceding the commission of the offense." At the plea hearing, Franklin admitted he was operating a motor vehicle on January 21, 2004, and "as a result of [his] operation of that motor vehicle [there was] an accident in which a young child was injurred [sic]." (App at 68.) The child "received injuries that, um, by their nature were life threatening injuries." (*Id.* at 70.) Franklin admitted he had "been drinking," he "had lost the normal use

and control of [his] faculties and impaired [his] driving," and he was "intoxicated when [he was] driving." (*Id.* at 69.) He acknowledged he had been convicted of OVWI in 2002, which conviction was within five years of the accident.

In addition to the underlying substance offense, Ind. Code § 35-50-2-10(b) requires proof beyond a reasonable doubt the person "accumulated two (2) prior unrelated substance offense convictions" before the person can be adjudicated an habitual substance offender. Referring to his 1998 and 2001 convictions, Franklin admitted he had been "convicted twice even before that [2002 conviction] of Operating While Intoxicated." (App. at 70.)

Ind. Code § 9-30-10-16(a)(1) provides: "A person who operates a motor vehicle . . . while the person's driving privileges are validly suspended under this chapter . . . and the person knows that the person's driving privileges are suspended . . . commits a Class D felony." At the plea hearing, Franklin admitted he was operating a motor vehicle on January 21, 2004, at that time his license had been suspended, and he knew his license had been suspended. His license had been suspended "because [the Bureau of Motor Vehicles] had determined [he was] a habitual traffic violator." (App. at 68.)

The "essence of the HTV offense [operating a vehicle after being adjudged an habitual traffic offender] was the act of driving after being so determined. The focus is not on the reliability of the underlying determination, but on the mere fact of the determination." *State v. Hammond*, 761 N.E.2d 812, 815 (Ind. 2002). In other words, the circumstances giving rise to the suspension are not essential

elements of the offense of driving while suspended. Franklin's conviction of driving while suspended was fully established by the admission he knew his license was suspended under Ind. Code ch. 9-30-10 at the time he was driving. Further evidence regarding the basis of the suspension was surplusage.

Consequently, Franklin has failed to demonstrate a reasonable possibility the evidence used to establish the essential elements of the HSO adjudication were also used to establish the essential elements of driving while suspended.

CONCLUSION

By pleading guilty, Franklin waived the right to challenge his convictions on double jeopardy grounds. Waiver notwithstanding, he was not subjected to double jeopardy.

Accordingly, we grant rehearing, affirm the post-conviction court, and affirm our previous opinion in all respects.

NAJAM, J., and MATHIAS, J., concur.